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READINGS FROM ANCIENT CHINESE CODES AND OTHER SOURCES OF CHINESE LAW AND LEGAL IDEAS¹

WITH the legal profession today there is a growing interest in the study of universal legal ideas. Legal ideas, it would seem, gain strength by extension both in time and in space. As *ius gentium* is necessarily more congenial to human reason than *ius civile*, so it may be said that the laws of all ages are more deep-seated in human nature than those of a particular generation. The scope of comparative jurisprudence, therefore, embraces all the length and breadth of legal scholarship, so that it cannot afford to ignore any materials that may give us light upon the legal notions of the ancient world.

China is the oldest nation that flourishes on the globe today. Her civilization had already attained a high stage of development when that of Rome was still in its cradle.² A country could not possibly have lasted so long without sound legal principles as her foundation and without having continually drunk from the life-giving fountain of justice to perpetually renovate herself. Much of the material in the ancient Chinese law has hitherto been buried in the almost inaccessible mines of Chinese literature; and a great need has been felt, especially by the comparative jurists, of whom Dean Wigmore is an acknowledged leader, for translations of Chinese legal documents into English.³ We, indeed, find here and there some legal points

¹ By ancient China I mean to include the period from 2255 B. C. to 630 A. D. The dates for the various dynasties and reigns are taken from the comparative chronological tables of Chinese cycles in the "Chinese-English Dictionary" compiled by Dr. Herbert Allen Giles one of the most accomplished Occidental students of the Chinese literature and history. These tables are generally recognized as accurate. I have no other means for determining their authenticity. It may, perhaps, be assumed that they may be depended upon for the proper chronological sequence of the dynasties and reigns, and therefore for conclusions as to the relative antiquity of the several documents cited.

² For verification of this statement, see Judge Lobingier's article "A Bibliographical Introduction to the Study of Chinese Law," 26 THE GREEN BAG, 399. It is advisable to read his whole article.

³ Dean Wigmore has expressed his desire to see materials in the ancient

in Dr. James Legge's Translations of the Chinese Classics; but it is very difficult to get at them there, as they are intermingled with many heterogeneous topics. I have accordingly undertaken a translation, altogether new, of the important passages found in the Chinese Classics; and this article presents a translation of the Chinese law, by a Chinese bred under the genuine Chinese influence.

The greater portion of the readings is for the first time rendered into English, so far as my limited research warrants me in saying. The legal literature of the Han Dynasty is very rich, consisting principally of the edicts of the emperors, in which we find not a few basic principles of law. The fact that the Chinese are still designating themselves as "men of Han" evidences that they have greatly cherished the law of Han, which virtually forms a part of the "law of the land." In truth, the law of Han is the law of liberty, of toleration, and of mercy, as will be seen in the readings. The Annotated Code of the T'ang Dynasty is now rare even in its original language; in fact, I had hunted after it for three long years before I could procure a copy in an old book-store in Shanghai. From a juristic point of view, this code has far greater value than the well-known Ta Tsing Leu Lee, which has been translated by Sir George Thomas Stuanton. Some time later I may be able to translate the whole code with its interesting and instructive annotations. In the present article I content myself with selecting some of the general provisions.

I have made some comments, in the foot-notes, on the developments of the ancient notions of criminal justice; I have also tried to show the connection of law with the society and circumstances of the time in which it originated or existed. Further, I have called attention to the three evolutionary stages in the progress of law, which are, in Professor Kocourek's phraseology, (1) the period of confusion of religion and law, (2) the anethical stage, and (3) a synthesis of law and morals.⁴ Finally, an attempt has been made to convince the world of the abundant preparation of the Chinese legal mind for the acceptance of the modern sociological jurispru-

Chinese law translated, both in his letter to Judge Lobingier in 1914 and in his letter to me last fall.

⁴ See Professor Kocourek's Introduction to Berolzheimer's *THE WORLD'S LEGAL PHILOSOPHIES* in the Modern Legal Philosophy Series, p. xxx.

dence, in the hope that extraterritoriality may be withdrawn from the oldest land of freedom and justice. In the field of law, ancient China produced a Law of Nature School, with Lao-Tzse as its founder; a Humanistic School, with Confucius at its head, and Emperor Wen as its patron; a Positivist School, with Shang Iang for its leader; and lastly, the Historical School, represented by Pan Koo. I have carefully selected from each of these schools representative works; and the modern jurist, I trust, will not fail to grant that a wise combination and adjustment of the four elements enunciated therein, namely, pure reason, administrative justice, certainty and definiteness, and the idea of historical growth, brings us very near to the twentieth century conceptions of law.

SECTION I—READINGS FROM THE SHU KING, OR THE BOOK OF HISTORY⁵

1. *From the Canon of Shun.*⁶

The Emperor promulgated the Penal Code, in which banishments were introduced as substitutes for the preëxisting five corporeal penalties, namely, (1) branding on the forehead, (2) cutting off the nose, (3) cutting off the feet, (4) castration, and (5) death. He also ordained that the whip should be used in the magistrate's courts, and the birch-rod be employed as a reformatory measure and pecuniary fines be imposed for minor offenses.⁷ It is further

⁵The Book of History was compiled by Confucius; it contains a series of historical records, covering the period from 2355 B. C. to 719 B. C. The following three extracts are translated from "LAN PENG SHU KING," vol. 1, pp. 14-18; vol. 1, pp. 26-27; vol. 4, pp. 28-36, respectively. "LAN PENG SHU KING" was printed by the Glass Factory, Peking, China, in the year 1880. It is an authorized edition, consisting of four volumes. It is sold at nearly every book-store in China; it is also to be found in the University of Michigan Library.

For comparison, see Legge's Translation of the SHU KING in Vol. III of Max Müller's SACRED BOOKS OF THE EAST, pp. 37-45, 48-49, 254-255; also Walter Gorn Old's THE SHU KING, pp. 9-21, 23-24, 284-292; also S. Couvreur's CHOU KING AVEC UNE DOUBLE TRADUCTION EN FRANCAIS ET LATIN, pp. 12-32, 36-38, 375-390.

⁶Emperor Shun reigned from 2255 to 2205 B. C.

⁷From this it may be inferred that prior to the time of Shun the use of punishment as a reformatory measure was unknown. It should also be noticed that he introduced the birch-rod and fines merely for minor and

provided in the Code that wrongs through pure inadvertence or because of accident should be wholly forgiven, while those who should presumptuously and deliberately violate the laws should suffer to the full extent the prescribed penalties.

The Emperor said to himself: "O! Let me be ever so reverent, and let mercy be my watch-word in administering punishments. * * *

The Emperor instructed Kao Yao,⁸ saying: "Kao Yao, the barbarous tribes disturb our beautiful land, and there are also among our own people robbers, murderers, insurgents, and traitors. It is your duty, as a criminal officer, to apply the five corporeal punishments, for the infliction of which, remember, there are the three appointed places; that is to say, the infliction of death should be performed in an open field, castration should be done in a secret apartment, and the remaining three modes of punishments should be inflicted under roof, lest the cold should affect a wound and cause death. With reference to banishments in general, there are the five prescribed directions, and in each direction there are three gradations of distance. Remember that it is only when you judge in accord with reason and justice that your decision will be willingly accepted by the parties, and gain popular approval."

2. *From the Counsels of Ta Yu.*⁹

The Emperor said: "Kao Yao, I have been delighted to see, since you took charge of the administration of justice, that none of my ministers or subjects have offended against the laws. It is due to your clear interpretation of the penal laws and your intelligent application of them to the inculcation of the numerous cardinal duties that belong to the five ordinary relationships of man,¹⁰ that peace and order have prevailed in the Empire. You have acted

emendable offenses. For graver wrongs, either mutilation or banishment was resorted to. In fact, for many centuries after his time the purposes of punishment continued to be vengeance and outlawry, because punishments by mutilation, which were not abolished until the reign of Emperor Wen of Han in the second century B. C., could never be consonant with the idea of reformation.

⁸ Kao Yao was the Minister of Justice.

⁹ The following discourse took place in the year 2222 B. C., approximately.

¹⁰ The five ordinary relationships are (1) King and Subject, (2) Father and Son, (3) Brother and Brother, (4) Husband and Wife, and (5) Friend and Friend.

upon the proper conviction that the ultimate purpose of penal laws lies not so much in punishing the guilty as in lifting the people above the necessity of punishments, so that they may set themselves to the cultivation of virtue and practice of moderation. This is meritorious, indeed."

Kao Yao replied: "My Emperor, you are perfect in virtue. You deal with your inferiors without haughty pretensions, and you govern the people with a sympathetic attitude and tender hands. Under your auspicious rule, punishments do not extend to the heirs of a criminal, while rewards¹⁰ reach to successive generations. You pardon inadvertent acts, no matter how serious their effects may be; and you punish intentional offenses, notwithstanding their triviality. Both in imposing punishments and in conferring rewards, you give your subjects the benefit of a doubt. Between the possible alternatives of shedding innocent blood and releasing a guilty person, you prefer the latter.¹¹ Your mercy and moderation has so influenced the minds of the whole people that they would scarcely think of disobeying their superiors or of doing violence to each other."

3. *King Muh's Instructions to His Princes and Officers upon the Promulgation of the Penal Code Prepared by the Marquis of Liu.*¹²

* * * The King said: "It appears from the ancient records that Chi Yiu was the first to bring about confusion and sow the seeds of discord among the people, so that the greater portion of the whole population, being affected by the bad influence, became robbers, murderers, oppressors of the righteous, adulterers, conspirators, and traitors.

"It is also recorded that the rulers of the Meaou tribes did not employ moderation in regulating punishments. They introduced the five kinds of terrible penalties, calling them laws, and recklessly

¹⁰ To the ancient Chinese mind reward and punishment were necessary correlatives; this conception had its origin in the patriarchal theory of government, whose principle was moral discipline. Hence Oliver Goldsmith's observation, "The English laws punish vices; the Chinese laws do more, they reward virtue." See ALLIBONE, *PROSE QUOTATIONS*, p. 400.

¹¹ This corresponds to the proverb, "Better ten guilty escape than one innocent suffer." As human judgment is finite, it is always safer to err on the side of mercy.

¹² The Code was promulgated in the year 950 B. C.

butchered many an innocent victim. They were the inventors of such tortures as the slitting of nose and ears, castration and branding;¹³ and those who were suspected of crimes were indiscriminately punished, without allowing them to plead their cause or to offer any excuse. Thereupon, their people fell into a desperate state, and were driven to the practice of dishonesty and perjury, finding no safety whatever in being law-abiding. There began a reign of terror; and, instead of the sweet savour of virtue, the scent of innocent blood went up to the pitying Heaven. Then our great Emperor Shun stood for the cause of the suffering multitude, and repaid¹⁴ their oppressors through his dread majesty, cutting off the Meao-vites. * * * Po E was then directed to formulate and promulgate a penal code for the regulation of the people. * * * All the magistrates were commanded to keep the people within due bounds of law, to the end that they might be led to appreciate and cultivate virtue.* * *

The King continued: "Ah, you magistrates and criminal judges, are you not the appointed shepherds of the whole people? Follow the example of Po E, who gave his lessons to the people in order to avert punishments. Take warning from the rulers of Meaou, who would not inquire into the circumstances of criminal cases, thus making punishments instrumentalities of oppression; and who, instead of selecting proper men to look after the right apportioning of the five punishments, chose the violent and the bribe-snatchers as judges."

The King continued: "* * * Heaven, in its wish to regulate the people, allows us sometimes to make use of punishments, but it is our own duty to hasten the day in which they may be totally dispensed with. If I would put an innocent man to death, do not approve of me so as to assist me in oppression; nor should you follow my opinion, if I would spare a guilty person, lest we should relax the law.¹⁵ Reverently apportion the five punishments to the crimes, so as to develop the three virtues.¹⁶ Then shall I, the One

¹³ King Muh denounced these punishments, but did not abolish them. This shows that the then current sense of justice was in favor of retaining them. Nose for nose, ear for ear, wound for wound, was probably the original idea.

¹⁴ The word "repaid" is another evidence of the idea of vengeance.

¹⁵ Here we find some suggestion as to the independence of the judiciary.

¹⁶ The three virtues are mercy, justice, and rectitude.

Man, enjoy felicity; and the people be at rest under my happy régime."

The King continued: "Ah, you Governors of States and Territories, come, and I will show you how to make punishments a means of blessing. Your mission is to give repose to the people. To attain this end, you should choose none but proper men to fill the public posts; you should deal cautiously with criminal matters; and finally, you must be compassionate and considerate toward prisoners, so as to see whether there be any possibility of exculpating them. When both parties are present, with their documents and witnesses all complete, let the judges listen to the five kinds of charges that may be made. When they have carefully examined and been fully convinced of the guilt of the prisoner, let them apply one of the five punishments; but if the crime does not deserve corporeal punishment, let them inflict one of the five fines. If it appears to them that the offense is such as deserves neither corporeal punishment nor fine, let them class it with one of the five cases of inadvertence or mistake, and forgive it. Now, in settling the five cases of inadvertence or mistake, there are evils to be guarded against, namely, the influence of power, fraud, female solicitation, bribery, and private relationship. Any one of these evils should be held equally as bad as the crime which it seeks to bring under the category of the five cases of inadvertence or mistake, and should be punished accordingly.

"When you have any doubts as to the existence of the crime, then you should not inflict either corporeal punishment or fine, but should acquit the prisoner. Even when you have closely examined the evidence and have taken testimony, so as to remove any reasonable doubt, yet you must not make a hasty conclusion, but form a judgment from studying the appearance of the criminal. Any prosecution which is not substantiated by evidence should be dismissed immediately. In everything stand in awe of the dread majesty of God.

"When offenders offer excuses, though not altogether free from guilt, then exercise leniency. In such a case, the crime otherwise punishable with branding should be commuted to a fine of 600 ounces of copper; in like manner, the slitting of the nose should be commuted to a fine of double the said amount, the cutting off of the feet to 3000 ounces, castration to 3600 ounces, and death pen-

alty to 6000 ounces. Of course, in all these cases, the guilt must be actually proved.

"Now, of crimes that come under the fine of 600 ounces, there are, in all, one thousand; of 1200 ounces, also one thousand; of 3000, altogether five hundred; of 3600, in all, three hundred, and of 6000, two hundred.

"With regard to corporeal punishments, the total number of crimes that are subject to them amount to three thousand. Let the punishment be in just proportion to the offense, neither insufficient nor excessive. Admit no presumptuous, disorderly, or profane arguments. Enforce no laws that have already fallen into disuse." Use your wise discretion within the bounds of laws in force.

"In case the crime should fall within the category of some higher punishment, if there should be mitigating circumstances, apply to it the next lower grade of punishment. Likewise, in case the crime should fall within the category of some lower punishment, if there should be aggravating circumstances, apply to it the next higher. The imposition of fines is also to be determined after a full consideration of all the circumstances. Furthermore, punishments and fines should vary in their severity according to the character of a particular period. This seeming irregularity is the very means for securing true equality," the eternal principles of justice, the spirit of law, being preserved all through the necessary changes.

"Bear this in mind also, that although the effect of fines is not so severe as corporeal punishments, yet it does produce extreme distress. On no account let persons of deceitful tongues try any cases. The judgments of honest men alone can attain justice. Examine carefully where there are discrepancies in the pleadings. Do not be prejudiced; the view that you are resolved not to follow may

"A formal recognition by the emperor of the abrogation of law by customary disuse.

"The literal translation of this clause is, "Agreement exists in disagreement," or, "There is unity in diversity," the logic being that, as reason is the soul of law, therefore whenever the reason changes the law should also change. Every change may be a sign of irregularity on its face, but when we inquire after the cause we find the self-same spirit at work. In this passage, therefore, there is a subconscious suggestion of the modern sociological jurisprudence. Compare Dean Pound's remarks on sociological interpretation, on pp. 225-6 in *Science of Legal Method*, *THE MODERN LEGAL PHILOSOPHY SERIES*.

turn out to be right.²⁰ Decide the cases with compassion and reverence; cite and interpret the Code so as to fit the issues, and settle them by striving for the proper mean. When the case is thus concluded, all parties will acknowledge the justice of the sentence, and when it is reported to the sovereign, he will do the same. Your reports must be full and complete, setting forth all the necessary facts; and if the criminal has committed two crimes, that fact should be recorded, though the punishment should always be imposed on the graver crime alone."

The King concluded: " * * * Ye judges and princes, I speak with much fear, I meditate with much reverence, in regard to punishments, for the one great end of penal law is to promote virtue. We rulers of the people are responsible to Heaven for our injustice. Be impartial, particularly in regard to unsubstantiated charges;²¹ and in regulating the people, the proper method is to hear criminal cases before two or more witnesses. Never take advantage of lawsuits to enrich yourselves. Gain so acquired is but a heaping up of guilt, and will be punished by the condemnation of many. Stand always in awe of the punishment of God. God deals with men impartially, but men ruin themselves by evil-doing. If the punishments of Heaven were not severe for the corrupt officers, nowhere under the sky would the people have good government. * * *

SECTION II—READINGS FROM THE LI KI: A COLLECTION OF CUSTOMARY RULES OF THE THREE DYNASTIES²²

1. *From the Chapter on the Royal Regulations of the Three Dynasties.*

It was the duty of a criminal officer to determine the punishments by consulting and interpreting clearly the Penal Code, when he presided in the trial of a criminal case. After he had made a decision, he must refer it first to other officers, secondly to the clerks, and

²⁰ This reminds us of Sir Philip Sidney's celebrated passage, "In forming a judgment, lay your hearts void of fore-taken opinions; else whatsoever is done or said will be measured by a wrong rule; like them who have the jaundice, to whom everything appeareth yellow. See ALLIBONE, *PROSE QUOTATIONS*, p. 584.

²¹ That is, charges not supported by the testimony of other witnesses.

²² Li Ki was compiled during the second century B. C. The Three Dynasties lasted from 2205 B. C. to 256 B. C. See Legge's *LI KI* in Vol. XVII of

lastly to the people, in order to get their opinions as to its correctness. Though a party had clearly the intention to commit a crime, if there were no evidence of any overt act, the charge should be dismissed. The punishments should be as light as was consistent with the laws, and the justification offered by the prisoner should be taken and construed so as to excuse his crime as far as possible. Every judgment was required to conform to heavenly justice. Facts must be proved before the judge could base his decision upon them; and in hearing any criminal case, he should take into full consideration filial duty and loyalty which might have affected the defendant's acts, thus making allowances for all human impulses.²² He should carefully differentiate grave offenses from light ones, and discriminate with an unbiased mind the various phases and degrees of the criminal intent. In other words, he should strive to his utmost to fathom and understand the true situation of each case and *to give every man his due*, to the full satisfaction of all parties concerned.

In case a criminal charge appeared to be doubtful, the judge must submit the case to the people at large for the investigation of the facts;²³ and in case the latter could not ascertain them, the prisoner should be acquitted. Furthermore, the judge was to examine all the previous decisions on cases similar to the one before him, and base his judgment upon principles evolved from a deliberate comparison between them. The case having thus been decided, it was the duty of the clerk to make full report to the director of the district, who should review the decision and report it to the appellate judge, who was required to hear it in the outer court (in the pres-

Müller's SACRED BOOKS OF THE EAST, pp. 92, 140, 215, 235-237; also S. Convreur's LI KI AVEC UNE DOUBLE TRADUCTION EN FRANCAIS ET EN LATIN, Vol. I, pp. 56, 147-148, 274-275, 304-305. The following extracts are translated from "Kw'ei PIH LI KI," (1) in vol. 3, pp. 27-29; (2) in vol. 3, pp. 7-8; (3a) in vol. 1, p. 37; (3b) in vol. 2, p. 23. Kw'ei PIH LI KI was printed by Zan Chen Tang Printing Shop, Peking, China, in the year 1878. It is an authorized edition consisting of 10 volumes, and can be bought at almost all book-stores in China. It is also to be found in the University of Michigan Library.

²² Law is made for man, not man-for law; so that a wise legislator or judge should always bear in mind that he is dealing with human beings who have human affections, and not with animals which simply obey the dictates of natural instincts.

²³ Here we find some traces of a jury system.

ence of all the important officers and representatives of the nobility), and then report the case to the king himself. The king, as a rule, ordered the three ducal ministers to sit with the appellate judge and the director so as to form a joint court. After the decision of the joint court had been reported to the king, then, in the absence of the three excuses (ignorance, mistake, and forgetfulness), he decided upon the punishment.

In the imposition of punishments and fines, even the slightest offenses were not forgiven. The penal laws may be compared to the separate parts of a body; the body is complete, and its parts are mutually related so that not a single cell can be hurt without at the same time injuring the whole body. Such considerations ought to make a wise man careful in applying the laws.

2. From the Same Chapter.

Ranks of office were conferred in the Imperial Court, in the presence of other officers, the latter concurring jointly in the act. Punishments were inflicted in the market-place, the people as a whole thus participating in casting out the criminals. Consequently, anyone who had been exposed to the public censure by being thus punished, found himself an outcast from the community; for no one, great or small, was disposed to receive such a disgraced person into his clan. The good citizens, who should happen to meet the condemned criminal on the road, would never communicate with him for fear of being defiled. He was practically a homeless wanderer, a friendless man, drifting from one place to another, deprived of all protection and benefits from the government.²⁴

3. Extracts from Different Parts of the Book, Concerning Revenge.

A. A son must not live under the same sky with the murderer of his father; he must seek to fight with him until either he or his enemy should be killed. If his brother has been murdered, one should always carry arms along with him; so that in case he met the enemy, he might not lose the opportunity of executing vengeance upon him. One should not stay in the same state with the murderer of a friend.

B. Tse Hsia asked Confucius concerning revenge. Confucius

²⁴ In primitive society there was no greater punishment than that of being abandoned to one's self.

said: "When a parent has been murdered, the son should be alert even in the night—sleeping on the thorns, with his shield for a pillow. He should refrain from taking office in any state, lest there be a conflict between public and private duties. In short, he should not live in the same world with the enemy; if he happened to meet him in the market-place or even in court, he should fight with him without delay. When his brother has been murdered, one may hold office, but not in the state where the murderer has his domicile. In case he is sent on a mission by his ruler to the state in which the enemy lives, he should not fight with him even if he should meet him there. When his paternal cousin in the first degree has been murdered, one should not take the initiative in the avenging, though he should render his assistance to the proper avenger of blood."²⁵

SECTION III—READINGS FROM LAO-TSZE'S²⁶ TREATISE ON THE LAW OF NATURE AND PRACTICAL UTILITY²⁷

1. *Adaptation to Change.*

That system of law which gives full play to the inarticulate dictates of nature is most conducive to the people's welfare. Laws that are over specific and inflexible often result in injustice.²⁸ * * * What

²⁵ These two extracts show that in the time of Confucius (fifth century B. C.) blood-feud still existed side by side with the proper tribunal, and that it was sanctioned by the then current sense of morality.

²⁶ A great philosopher and religious teacher, who flourished during the sixth century B. C.

²⁷ This is commonly translated as the Canon of Reason and Virtue. The translation here given seems appropriate to my present article. The two following extracts are translated from "LAO TZE TAO TEH KING," Chapters 58 and 74, respectively. It is included in the "PEH TZE CHUEN SHU," or the "HUNDRED PHILOSOPHERS' COMPLETE WORKS," published by Sau Yeh San Won Book Co., Shanghai, China.

For a more literal translation, see Legge's *TEXT OF TAOISM*, in Vol. XXXIX of *Müller's SACRED BOOKS OF THE EAST*, pp. 101-102, 117; also Carus's *LAO-TZE TAO-TEH-KING*, pp. 126-127, 134. But it should be remembered that a literal translation of the original wording and a faithful representation of the original meaning are two different things, and I have chosen the latter.

²⁸ Lao-Tsze was for simplicity of laws. The "inarticulate dictates of nature" corresponds to Burke's "plain good intention" in his famous passage, "Refined policy ever has been the parent of confusion; and ever will be so as long as the world endures. Plain good intention, which is as easily dis-

was once regarded as normal may be abnormal now, and what was good in the eyes of the ancients may appear preposterous in the modern light. This has from time immemorial bewildered the people. Therefore the policy of a wise ruler is to be firm but not unyielding; he should hold to his ideal, but not in such a way as to hurt the people; he should enforce the laws only within the bounds of natural justice. * * *

2. *What is Wrong with the Law.*

Under bad laws the people's living conditions have already been made intolerable, so that life and death are but neighbors, and the people neither dread the one nor cherish the other. Such being the case, how can they be restrained from crimes by fear of capital punishment? In order to make the people afraid of death, the government must first of all make life safe and sweet. Then if they be so daring as to commit crimes, they will be put to death justly; that is to say, in that case, the death penalty is sanctioned by justice and reason. Now, justice and reason are the only legitimate judges and executioners;²⁹ and therefore for a ruler to substitute his caprice in place of justice and reason is usurping the function of the law of nature and is in fact condemning himself.

SECTION IV—READINGS FROM CONFUCIAN ANALECTS³⁰

1. Confucius said: "If a ruler, in regulating and controlling his people, lays emphasis upon laws and resorts to punishments for their violations, the people will strive to live up only to the bare require-

covered at the first view as fraud is surely detected at last, is of no mean force in the government of mankind." This explains the reason for the fact that when a state is most corrupt then the laws are most numerous.

²⁹ Shakespeare had probably the same thing in mind when he wrote, "And they (judgment and reason) have been grandjurymen since before Noah was a sailor"—*Twelfth Night*, Act 3, Scene 4.

³⁰ The five following extracts are translated from "LUEN YUEN" or "CONFUCIAN ANALECTS," (1) in vol. 1, bk. 2, p. 8; (2) in vol. 2, bk. 12, p. 17; (3) in vol. 2, bk. 20, pp. 8-9; (4) in vol. 2, bk. 13, p. 6; (5) in vol. 2, bk. 19, pp. 4-5. It was printed by Zan Chen Tang Printing Shop, Peking, China, in the year 1878. It is an authorized edition, consisting of two volumes and divided into twenty books; it is sold at nearly every book-store in China, and is also to be found in the University of Michigan Library. Compare Legge's *CONFUCIAN ANALECTS*, Bk. II, Chap. 3; Bk. XII, Chap. 13; Bk. XX, Chap. 2; Bk. XIII,

ments of the law; they will be utterly destitute of the sense of personal honor. Direct them to the practice of virtue, and regulate them through the medium of moral discipline, and they will naturally have the sense of personal honor, and will at the same time be orderly in their conduct."

2. Confucius said: "In hearing and deciding cases which have already arisen, I am not a bit better than other judges. But I consider it the paramount function of a judge to see to it that under his jurisdiction there be no occasions for going to law."

3. Tsze-chang asked Confucius, saying: "How should a man qualify himself for a public office?" The latter replied: "He should know how to exercise the five virtues, and how to avoid the four vices." * * * Tsze-chang said: "What are the four vices?" The master answered him, saying: "To punish the people without first educating them; this is called tyranny. To require of the people to conform to laws without first bringing them to their notice; this is called violence. To punish of a sudden the breaches of those ordinances or laws which the people have been induced to believe have already fallen into disuse by reason of their ruler's laches in executing them; this is oppression. To deal with the people in a spirit of bargain-making so as to stick to the exact letter of the laws without looking for justice and mercy; this I hold to be a mechanical administration of the law."²¹

4. The Duke of Sheh said to Confucius: "In my country there is an honest man who, when his father stole a sheep, informed the public authority of the fact." Confucius replied: "Well, in my coun-

Chap. 18; Bk. XIX, Chap. 19. Confucius was an advocate of government by personal example, believing that the fickle populace changed with the prince, who was the parent of all. In patriarchal government the offices of king and priest being combined in one person, Confucius confused ethics with law. He thought, with Seneca, "What narrow innocence it is to be good only according to law!" and finally reached the conclusion that it was better for the prince to keep the people, his children, to their duty by a sense of honor and by moral rules rather than by law. This marks the stage of confusion of law and morals.

²¹This seems to say, in the language of Mr. Justice Holmes, "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." *Lochner v. New York*, 198 U. S. 76; see Professor Drake's article on "The Sociological Interpretation of Law," *MICH. LAW REVIEW*, Vol. XVI, No. 8.

try, an honest man would act differently. True honesty requires the father and son to refrain from disclosing each other's misconduct."²²

5. Having been appointed to be chief criminal judge in the state of Mang, Yang Foo came to the philosopher, Tsang, to ask for a guiding principle. The latter said to him: "The hearts of the people have long been detached from their government on account of the fact that the rulers have failed to entertain the proper attitude toward them. My counsel to you is that, in hearing a criminal case, when you have found out the truth of the accusation, be grieved for and pity the criminal, and by no means rejoice at your own ability in discerning his guilt."

SECTION V—READINGS FROM THE POSITIVIST SCHOOL DURING THE EPOCH OF THE CONTENDING STATES²³

1. *Shang Iang on the Supremacy of Law.*²⁴

A country is governed through three instrumentalities, namely, (1) laws, (2) the certainty that the laws will be enforced, and (3) the power to carry them into effect. The administration of law rests with the king and his ministers, and in order to establish the supremacy of law in the eyes of the people it is their joint duty to apply it strictly in accordance with its letter and spirit. The king, how-

²² His theory is that domestic affections are the surest basis of all good government.

²³ From the fourth century B. C. to the middle of the third century B. C. During this period the power of the king was on the decline, and the feudal lords were struggling for supremacy. Prior to this there had been but one king and one state; now there came to be numerous independent kings and states. As was natural, nationalism began to be felt, which had had no place previously in a world-state. With nationalism came "lex." The king of each state, wishing to compete with every other, laid much emphasis upon agriculture and war, for the efficient management of which a great deal had to depend on positive law and coercive authority behind it. Hence, the Positivist School was a natural product of the age.

²⁴ Shang Iang was the Prime Minister under Duke Hsiao of Ch'in. He may be called the Chinese Draco, tolerating nothing that was against the laws of the state; and it may be said that in his lexicon there was no such word as mercy. The following extract is a translation of his essay on "Maintenance of Authority," forming the Chapter XIV of the "SHANG CHUIN SHU," which is included in the "PEH TZE CHUEN SHU" (see note 27).

ever, is alone the custodian of the executive power, he being the sole head of the whole nation. * * *

It is too often the case that unskilful rulers, not being able to appreciate the importance of laws, rely upon personal judgment for handling governmental affairs, and as a natural consequence, their country falls into terrible disorder and confusion. The wise kings of old established standard weights and measures, which we are still using because of their accuracy. Now, suppose that we should dispense with these altogether, and try to tell the weight of things by balancing them in our untrustworthy hands, or to judge the length of a piece of cloth by our unreliable eyes, how can we agree one with another as to the precise amount? It is exactly for the same reason that we cannot do away with laws, for laws are fixed standards of justice, without which as guides our capricious and ever-changing minds are hardly to be trusted any more than our hands or eyes with reference to weights or measures. Of course, I am not to be understood as denying that it would be best of all for a nation to be governed by a perfectly wise and unselfish ruler, such as Yao, unfettered by any laws whatever, but the fact remains that not every generation produces a Yao, and that rather than wait for a wise governor, and in the meanwhile suffer all the evils that may be expected from a commonplace ruler who is neither wise nor yet is restrained by laws, I am certainly content with a government by fixed laws in spite of all its defects and disadvantages. Since, therefore, laws are absolutely necessary in the community as it exists today, all people who behave themselves within legal bounds are to be properly protected and rewarded by the government, while those who boldly set the laws at defiance should be punished without mercy, as being a public nuisance. When the system of rewards and punishments is well settled and promulgated, the people will find in it an unfailing guide as to what is legal and what is illegal. and there will be little or no occasion for disputes among the people. * * *

The king, though he is the ruler of the whole nation, has no right to treat his power as a personal monopoly: on the contrary, he reigns for the sake of the national welfare, and this is the reason why the sage Emperors Yao and Shun, instead of transmitting the throne to their sons, appointed wise and able men to succeed them. They well knew that the selfish love between father and son should

give way to consideration of the general well-being, which is the higher form of love; and this is the whole secret of their successful public careers. On the other hand, history bears full record of unscrupulous rulers who took the laws, as it were, into their own hands so as to usurp all national rights and fatten themselves upon the flesh and blood of the people. After all, what happened? As shadow follows substance, even so does the overthrow of the throne follow oppression. It is sufficiently clear, then, that unselfishness in a ruler conduces to his personal honor and to the national security, whilst selfishness works the opposite results. Since justice is the consummation of unselfishness, and since laws are the very means for bringing about justice, an unselfish ruler must necessarily be one who maintains the supremacy of the laws.

Another disadvantage of placing transitory opinions before laws is to be found in the fact that it gives rise to deceptive and oppressive practices on the part of the magistrates,—taking for granted that the king himself be a proper man. Without a common standard of justice, the magistrates could easily and with impunity cheat or threaten the people under their jurisdiction and knit for themselves, so to speak, networks of law of their own, to catch innocent victims in a whirlpool of tricks. * * * All these mischiefs can be ended only through maintaining the supremacy of law, and discarding all personal judgment.

2. *Shuen Tao on the Advantage of Definiteness of Law.*²⁵

Law is designed to regulate the activities of a nation, and it is a body of uniform and impartial rules of civil conduct. Within the definite limits of law there is no room for the cunning and wicked to play court tricks, nor can any subtle tongue confuse right and wrong. Let us by all means restrain our passions within the limits of law. Let selfish affections vanish before the majesty of law. Our joy and anger may be repressed, but law should never be vio-

²⁵ Shuen Tao was a contemporary of Shang Yang; his views also reflect his environment. This marks the second age in the legal evolution—i. e., the anethical age. The following extract is translated from Zia Wu-liang's "CHUN KUO CHIH HSIO SZE," or "READINGS IN THE CHINESE PHILOSOPHY," Part I, Division II, Chapter 3, pp. 73-74; published by the Chun Hua Book Co., Shanghai, China.

lated. Our beloved ones may be punished and our families may be extinguished, but justice should never be denied its full play. Even if a legal system be not as perfect as it ought to be, after all it is much better than lawlessness, for laws tend more or less to unify the minds of the people. Take, for instance, the common practice of casting lots for the division of property and for the choice of cattle. The casting of lots does not necessarily bring about the ideal justice; nevertheless, it does a valuable service by way of settling the claims of the parties concerned, inasmuch as it helps the one who gets the better property to enjoy it free from any clouds upon his title, and makes the other who gets the inferior portion to rest contented with his lot. As the standard weight is designed to establish fair dealing, and as the written instrument is used for securing the faithful performance of a promise, so are statutes and sanctioned customs intended to work out justice and equity.

SECTION VI—READINGS FROM THE LITERATURE OF THE HAN DYNASTY¹⁸

1. *The Tripartite Compact of Emperor Kao.*¹⁹

My Venerable Seniors!

I know too well how long you, my fellow-countrymen, have suffered untold hardships under the harassing laws of the preceding dynasty, by which the criticizing of government was punished with the extermination of one's whole family, and even talking on the streets was prohibited under pain of decapitation. You all know that there was a mutual understanding between myself and other leaders to the effect that whosoever first entered the capital should ascend to the throne. Having fulfilled the condition precedent, I have been made King as a matter of right. In your presence, I do solemnly make the tripartite compact with all my people, to-wit, (1) that the death penalty shall be imposed for murder, (2) that appropriate punishments shall be imposed for injuries to the person, and

¹⁸ Han lasted from 206 B. C. to 277 A. D.

¹⁹ Emperor Kao reigned 206-195 B. C. The following extract is translated from the "LIFE OF HAN KAO CHU," in Emperor Kien Lung's Edition of Sze Ma Chien's "SZE CHI," or "HISTORICAL RECORDS," bk. 8, p. 7. This book is widely read in China, and is procurable at most of the Chinese book-stores.

(3) that appropriate punishments shall be imposed for theft and robbery. The laws of the Ch'in Dynasty are hereby repealed.

I pledge myself to abolish public evils; I never allow myself to indulge in violence and oppression. Have confidence in me, my elders.³⁸

2. *Emperor Wen's³⁹ Mandate Abolishing Mutual Responsibility of Family Members for the Crimes of Each Other.⁴⁰*

Law is nothing but administrative justice. It is designed to prevent violence so as to protect the innocent. Now, it does not seem to us to be just and reasonable that, in addition to punishing the

³⁸ Notice how safety of life and person and security of property are guaranteed. This charter compares favorably with Magna Charta of King John, especially in view of the fact that it was voluntarily given. We must not ignore the truth, however, that if we look at it not from the standpoint of the king but from the standpoint of a whole nation, a constitution has an infinitely greater value when it is wrung from the government at the sword's point than when it is given as a matter of grace. In the former case, the people take the initiative, and therefore they will guard their rights with jealousy and alertness, and the constitution, though it may be unwritten, is cherished and preserved alive in the hands of the people; while in the latter case, where the people are not intelligent enough to appreciate the importance of a constitution, it will become a dead letter, even though it is a written one. For these last two years, the students in China, having seen this great truth, have started a constitutional campaign in order to bring home to the masses a feeling for the necessity of a permanent constitution, so that they may take the initiative in the solution of the impending constitutional problems; and the students are doing their work so smoothly and energetically that it is hoped the celestial goal of union and peace, with an intelligent public opinion as the goal-keeper, is not far from attainment. In law as in economics, demand must exist before supply.

³⁹ Emperor Wen reigned 179-157 B. C. He was one of the most enlightened, humane, and pious emperors, of whom the world can well be proud. See Parker's article on "The Principles of Chinese Law and Equity," *LAW QUARTERLY REVIEW*, XXII, 201-202. It is advisable to read his whole article. The three following extracts are translated from the "LIFE OF HAN WEN TI" in the *SZE CHU* (see note 37), bk. 10; pp. 3, 4-5, 6-7, respectively.

⁴⁰ Mutual responsibility was coeval with blood-feuds. As has been observed the idea of revenge was peculiarly retaliatory. Father for father, child for child, wife for wife, was the original practice; later, the precise *persona* was not demanded, and the equation became "family member for family member." In the Epoch of the Contending States, however, blood-feuds had disappeared on the advent of nationalism, but mutual responsibility was retained by positive law for mere political purposes, among which was

guilty, their innocent parents and brothers should also be involved in punishments, and their unfortunate wives and children condemned to slavery. This unjust rule finds no place in our mind, and it is hereby abrogated.

3. *Emperor Wen's Charter of Liberty of Speech.*

In the good old times, the rulers used to plant in each public market a flag, called "the flag of remonstrances," and they also hung up a board of wood, called "the board of criticisms." These proved very serviceable in helping to attain a proper method of government, and in removing the bar between the king and his subjects. Now, our law punishes persons for criticizing policies of our government and for spreading heresies.⁴¹ This causes the ministers and the people to refrain from pouring out their whole hearts to us. And now, how can we know our faults and mistakes, being deprived of such a valuable source of instruction? For the above reasons, we hereby repeal the said statute.

4. *Punishments by Mutilation Abolished.*

A prefect of T'ai Ch'ang by the name of Hsin U-Yi was found guilty of a crime punishable by mutilation. His youngest daughter, Di-yong, filed a petition with the Emperor, containing the following allegations: "Your maid-servant's father has been a public official of pure character and good reputation. Now, he has transgressed the law and is subject to punishment. Deep melancholy seizes upon my heart when I think that just as the dead cannot be revived, a person mutilated can no longer be made whole. Even though he desires to mend his ways and begin a new career, he is handicapped by physical deformities. I, your maid-servant, humbly pray that I may be allowed to give myself into a perpetual servitude in the Imperial Court as a substitute for my poor father's punishment." The Emperor, sympathizing with the general purpose of her prayer, issued a mandate abolishing all punishments by mutilation. The mandate reads as follows:

the suppression of rebellion. Emperor Wen, believing that justice alone could satisfy the minds of the people, could see no reason why mutual responsibility should not be abolished. Hence the following mandate.

⁴¹ Doctrines contrary to accepted traditions, especially Confucianism, had been regarded as heresies. This charter, therefore, gives freedom of religion as well as that of speech.

We have heard that, under the propitious reign of the ancient Emperor of Yuen, there were no other punishments than painting the criminal's clothing and cap, and making special marks on his dress.⁴² Lenient though the law was, the people did not transgress it. Was this not because the sage Emperor was always mindful of the people's welfare?⁴³ Now, our law provides no less than three corporeal punishments by mutilation; yet crimes still prevail. Who is to blame? We are quite conscious that the blame should be laid on our person, having been lacking in personal virtue and negligent in enlightening and influencing the people. We feel the pricking of our conscience. When the people are not properly educated and directed, the natural consequence is that the more ignorant ones fall into crimes. The Book of Poetry says, "Oh! Our lovable king, the parent of all." Now, our poor children, the people, offend in ignorance, and they are overtaken by punishments almost unawares. Thus they are deprived of the opportunity of self-reformation, being mutilated for life before they understand what is good. Pity at once fills our heart, as we meditate upon the terrible and cruel penalties of branding the skin and cutting off the limbs. Do not these unnatural practices militate against the original idea that an emperor is the common parent of his people? For the above reasons, all corporeal punishments by mutilation are hereby abolished.⁴⁴

5. *Emperor Ching's Instructions to Judicial Officers.*⁴⁵

Upon the administration of justice depends the safety of the lives of people. The dead can never come back to life. These considerations have always been a source of anxiety to us.

⁴² A criminal thus marked became practically a taboo. This statement seems to corroborate the belief commonly held by the students of comparative law that outlawry was the capital punishment of a rude age.

⁴³ The logic was that when an emperor was of a merciful turn of mind his influence would affect the people's minds so that there would be scarcely any occasion for injuring one another or offending against the public authorities.

⁴⁴ It is worthy of note that with Emperor Wen the idea of reforming the criminal came to be predominant in punishment.

⁴⁵ Emperor Ching reigned from 156 to 141 B. C. The following extract is translated from Wu Ch'u Ts'ai's "KANG KAN YI CHI LUH," or "SIMPLE READINGS IN CHINESE HISTORY," bk. 12, p. 7; published by the Commercial Press, Shanghai, China.

You judges are hereby instructed that in cases where you have doubts as to the application of statutes; or where the statutes are plain and certain, and you have no doubt but that they should govern the matter before you, but yet your minds are not satisfied as to their intrinsic justice when applied to the particular case; you should refer them to us for further deliberations.⁴⁶

6. *From Lu Wen-Shu's Memorial Remonstrating Against the Use of Torture in Trials.*⁴⁷

May it please your Majesty:

* * * Man enjoys the sweets of life only when his mind is undisturbed: when he is troubled, he prefers death. Under the pain of torture, what is there that cannot be extorted from the lips of the prisoner? When he is unable to bear the suffering he is oftener than not driven to make a false confession in order to secure temporary relief. Taking advantage of the situation, an unprincipled magistrate would suggest to him what he wants him to say, shaping his words into whatever form would incriminate him. * * * This abuse must be abolished before peace and happiness will reign in our empire.⁴⁸

7. *Emperor Suan's Mandate Abolishing the Crime of Hiding One's Guilty Parent, etc.*⁴⁹

The affection between father and son, and the love between husband and wife are given to human beings by heaven; for one to try to preserve the other at the risk of his own life in times of misfortune is simply an indication of one's inborn nature and an evidence

* One cannot but be astonished to see how carefully possible miscarriages of justice are guarded against. The method of remedying them is twofold: first for the judge to pronounce the statutes unjust for the particular case before him, and then for the emperor to administer justice free from the fetters of any statutes.

* Lu Wen-shu lived in the first century B. C. The following extract is translated from the "KANG KAN YI CHI LUH" (see note 45), bk. 16, pp. 10-11.

* The remonstrance was not accepted. In fact, until the establishment of the present republic, torture had always been employed in trials. From this memorial, however, we see that confession had already been regarded as necessary to conviction.

* Emperor Suan reigned 73-49 B. C. The following extract is translated from Yao Nai's "KU WEN DZE LUEI CH'UEN," or "ANTHOLOGY OF CHINESE PROSE," vol. IX, p. 3; published by the Wen Ming Book Co., Shanghai, China.

of inner tenderness and noble impulses. How can we enforce laws at the expense of virtue? It is therefore decreed that hereafter a son shall not be punished when he comes to the court confessing that he has hidden his guilty parent, nor shall a wife be punished for hiding her husband, nor shall a grandson be punished for hiding his grandparent. Further, in case of a parent hiding his son, a husband hiding his wife, or a grandparent hiding his grandson, if the hiding is punishable by death, the magistrate shall refer it to us through the Minister of Justice.

8. *Emperor Yuan's Instructions upon the Revision of Laws.*⁵⁰

The objects of laws are the suppression of violence and the protection of the helpless. They should always be simple and clear, so that the people may easily know what is wrong and how to avoid it. Now, our statutes and ordinances are so complex and multifarious that even you legislators are not able to classify and clarify them; and yet you seem to say that ignorance of law excuses nobody; does it not require too much of the people? Laws, when they are too complicated, do not conduce to justice. You are hereby instructed to discuss the existing statutes, article by article, in order to repeal all unnecessary laws and to lighten all excessive penalties, so that the people may have a convenient and safe guide for their conduct.

9. *Hsio Von-tse's Memorial Protesting Against the Resolution of Allowing Criminals to Pay Grain in Commutation of Their Regular Punishments.*⁵¹

* * * Therefore, the difference between Yao and Ch'ih is that the former led the people to cherish justice, while the latter led the people to indulge in inordinate desire of gain. Now, if we allow criminals to pay grain as a substitute for their regular punishments, the natural consequence is that the rich are saved to the exclusion of the poor. Is it possible that the rich and the poor should suffer

⁵⁰ Ibid., vol. IX, p. 4. Emperor Yuan reigned 48-33 B. C. This instruction represents the thought that public convenience and safety are the paramount objects of law, and that, to quote from Sir Philip Sidney, "laws are not made like lime-twigs or nets, to catch everything that toucheth them, but rather sea-marks, to guide from shipwreck the ignorant passenger."

⁵¹ Hsio Von-tze was the Prime Minister under Emperor Yuan. Ibid., vol. IV, p. 4.

different punishments under one and the same law without destroying the fabric of the law?

Another disadvantage is that when the father of a poor family is convicted, his sons, knowing that money can save him from punishment, would naturally try their utmost to raise the requisite fund by all sorts of means, whether honorable or dishonorable. Their family would be ruined by the incurring of debts, though one life is saved. * * * It would certainly demoralize the people, for it teaches them that justice can be bought with money.⁵²

10. *Pan Koo⁵³ on the Origin of Government and Law.*

Man bears the image of God. As an exalted creature, he naturally inherits the five moral qualities from his Creator, namely, love, justice, morality, intelligence, and faithfulness. It is to these very qualities that he owes his supremacy over other creatures. On the other hand, he is not provided with claws and teeth strong enough to struggle with the lower animals for his daily sustenance and his feet are not sufficiently swift to carry him out of imminent dangers. Moreover, man is born naked, having neither fur nor feather to keep his body from exposure to cold and heat. In order to subdue the earth and have dominion over other living beings, he is obliged to resort to his intellectual faculties rather than to his physical strength, and this is what makes him a rational being.

The natural endowment of brotherly love in all men helps them in forming society, without which they would not be able to conquer the natural world and would soon die for lack of provisions. In primitive society, however, troubles now and then arose on account of one or another sort of disagreement between the members themselves concerning their conflicting interests. This fact

⁵² "One of the many bad features of the system of pecuniary mulcts was the introduction of a fiscal element into the administration of criminal law." POLLOCK AND MAITLAND'S HISTORY OF ENGLISH LAW, Vol. II, p. 451.

⁵³ An imperial historian, writing during the first century A. D. In jurisprudence, he may be regarded as representing the Historical School. In this selection is found an attempt to trace the origin of law to its sources in human nature. The phrase "natural endowment of brotherly love" corresponds to the "appetitus socialis" of Grotius. The historian also essays to justify the existence of law by necessity, and he maintains that punishment must conform to humanity's need of punishment. The following extract is translated from the "PAN KOO'S HISTORY OF HAN, ABRIDGED," published by the Chun Hua Book Co., Shanghai, China.

showed the necessity of having a ruler to govern them. The ruler, however, adjusted the differences not so much by resorting to physical power as by appealing to reason. He tried to pull up the very root of the troubles by setting a good personal example to his fellow men until his spirit of self-denial and self-sacrifice permeated the minds of all the people so that there was a general triumph of reason over passion. In the meantime, the people's confidence in him was gradually established, and this very confidence is the foundation upon which kingship is built.

In the book of the Grand Model it is remarked that the king is the common father and mother of his people and is the ruler over all his territory. Now why do the philosophers, who are always careful and accurate in classifying and defining things, speak of the king as a father and mother of the people? What they mean is that, as a parent loves and takes every care of his children, so should a king love and care for his people. This is really the fundamental principle underlying a royal government.

Love must be supported by reverence, and benevolence must be backed up by majesty. The former is effected through the medium of ritual, while the latter is accomplished by means of penal laws.

SECTION VII—READINGS FROM THE GENERAL PROVISIONS OF THE ANNOTATED CODE OF THE T'ANG DYNASTY⁴⁴

1. *Preliminary Observations.*—In the beginning, the three principal parts of the universe⁴⁵ first came into their proper order, and

⁴⁴ The Annotated Code of T'ang was promulgated in the year 630 A. D., under the reign of T'ai Tsung. It consists of twelve divisions, namely: (1) General Provisions, (2) Provision for the Protection of the Emperor, (3) Official Duties, (4) Enrolment of the People and Marriage, (5) Imperial Stables and Treasury, (6) Independent Political Actions, (7) Theft and Robbery, (8) Quarrels and Litigations, (9) Fraud and Deceit, (10) Miscellaneous Offenses, (11) Arrests, and (12) Trials. It is the earliest Chinese code that has come down to us in its original form; and in it we find an account of basic principles underlying the Chinese jurisprudence, especially in the annotations, which corresponds to the *responsa prudentium* of the Roman law. In fact, to some important provisions are appended hypothetical questions and positive answers, in addition to the annotations. For purposes of this article, I have translated only some of the general provisions in division (1).

⁴⁵ By the three principal parts of universe are meant Heaven, Earth, and Man.

then the whole cosmos gradually took form. Man alone being endowed with the spiritual essence and the rational will, was destined to be the head of all creatures. From time immemorial there have always been among human beings rulers whose function it is to regulate the people through the instrumentality of laws. There are in all ages men who are foolish, base, and dominated by passions, which tend to lead them into crimes; such men are a danger to the community—or at least an obstruction to the progress of civilization. This fact fully explains the necessity of laws. It is said, therefore, that laws aim at the cessation of punishments, and that the death penalty is calculated to do away with homicides. The proverb goes, "Spare the rod, spoil the child; relax the punishment, ruin the people."⁸ Laws are simple or complex accordingly as the people of a particular period are tractable or ill-disposed. * * *

The Book of Changes says, "God manifested his law through Nature, and this law the sage kings of old adopted." The king's awful majesty corresponds to the thunder, his enlightened justice corresponds to the lightning, and the death penalty was introduced in imitation of the destructive force of the autumn frost.⁹ The purposes of law are to warn the people to refrain from doing wrong, to prevent crimes in their inception, to mete out to each person whatever he deserves with even-handed justice, and finally to secure full play to the all-embracing love and mercy. Punishments are resorted to only in case of necessity. * * *

Statutes are nothing else than the approved balancing of reason and the positive rules of right conduct. According to the Book of Changes, in administering public affairs and in legislation, it is to be borne in mind that true justice consists in prohibiting what is wrong. By the balancing of reason, the seriousness of crime is

⁸The literal translation is, "Punishments and fines cannot be relaxed in a country any more than whips and birch-rods can be dispensed with in a family."

⁹This thought is not at all peculiar to the Chinese mind. We have from Froude, "Our human laws are but copies, more or less imperfect, of the eternal laws so far as we can read them," and from Shakespeare, "Merciful heaven! Thou rather, with thy sharp and sulphurous bolt, splitt'st the unwedgeable and gnarled oak, than the soft myrtle."

determined; in the statutes justice is embodied, the terms "statute" and "law" signifying the same thing. * * *

His Majesty the Emperor of our Great Empire of T'ang has established the royal sway through his Divine Wisdom and his remarkable popularity with the people. He takes delight in promoting the interests of his subjects and in reducing all destructive agencies to a minimum, thus aiding the smooth workings of Nature. The laws now codified and promulgated are for the most part declaratory of the model precepts which the ancient sage kings left behind them, arranged in a systematic manner so as to include both great principles and technical details. * * *

The fundamental maxim is not to be overlooked, that the great end of government is the promotion of virtue and social order, and that laws are the means for attaining the end. The precepts of morality are affirmative and advisory, whereas the rules of law are negative and prohibitory; both are equally necessary to the well-ordering of a nation, though each has its own separate functions.⁵⁹

We have appended to the statutes our clear and exhaustive annotations, which are based upon ancient authorities and upon the opinions of the two comparatively modern jurists, Hsiao and Kia. In some places we have undertaken to trace rules of law to the essential reason underlying them. In others, we have started with general principles and deduced therefrom rules of law.⁶⁰ All the provisions in the Code are clear and unequivocal, and at the same time flexible and broad enough to adjust themselves to reasonable

⁵⁹ Notice how "ius" and "lex" are combined. Compare Cicero's and Blackstone's definitions of law.

⁶⁰ This is an attempt to reconcile the two extremes of "rule of morality exclusive of law," on the one hand, and of "rule of law exclusive of morality," on the other; the former being taken by Confucius, who condemned law as demoralizing, and the latter by Shang Yang, who, instead of confining himself to his own business as a law-reformer, went to the extent of denouncing personal virtue (as contrasted with political virtue) as an obstacle in the way of national well-being and power. This marks the beginning of the stage of synthesis of law and morals.

⁶¹ The literal translation of these two sentences is, "Along the streams we set out in quest of the fountain; and from twigs we reach to the leaves." The former seems to be inductive, while the latter is deductive. To avoid the double metaphors in such a short space, I have assumed to disregard the original wording while preserving the real idea.

changes in the social conditions that may obtain in future generations. Laws are to human conduct what the steelyard and balance are to the weight of things and what the compass and square are to the accuracy of drawing. O! How excellent the time-honored Tripartite Compact;⁴¹ it is our purpose to make our laws conform to the ideas enunciated in that admirable Charter, and to its characteristic uniformity.

2. *The Five Categories of Punishment:*

1. Ch'ih, or flogging with the light rod.
2. Ch'ang, or flogging with the heavy rod.
3. T'u, or imprisonment at hard labor,
4. Liu, or banishment.
5. Sze, or death penalty.

1. Ch'ih has five degrees, namely, (1) ten blows, (2) twenty blows, (3) thirty blows, (4) forty blows, and (5) fifty blows.

Annotations—The term Ch'ih means, literally, "scourging," and figuratively, "shame." It is intended to punish and reform a petty offender by stirring up the sense of shame and penitence in him.⁴²

* * * It is said in the Book of History, the birch-rod was used as a reformatory measure, and this original idea still holds good. In the thirteenth year of the reign of Han Wen Ti, a prefect of T'ai Ch'ang district, by name of Hsin U-Yi, was convicted of a crime punishable by corporeal punishment by mutilation. His daughter Di-Yong filed a petition with the Emperor, praying to give herself into a perpetual servitude in the imperial court as a substitute for her father's punishment. The Emperor, sympathizing with the general purpose of her prayer, eventually abolished all these corporeal punishments, and introduced flogging as their substitute. * * * Law is nothing but the image of justice; when the image is once formed it is difficult to change it, and therefore a wise ruler should be extremely careful in providing penalties. * * *

2. Ch'ang, or flogging with the heavy rod, has five degrees, namely, (1) sixty blows, (2) seventy blows, (3) eighty blows, (4) ninety blows, and (5) one hundred blows.

3. T'u, or imprisonment at hard labor, has the following five

⁴¹ See ante, p. 519.

⁴² Compare Locke's familiar passage, "If punishment reaches not the mind and makes not the will supple, it hardens the offender."

degrees: (1) one year, (2) one year and half, (3) two years, (4) two years and half, and (5) three years.

Annotations—The term T'u means servitude. * * * The prisoner is confined in a dungeon, condemned to hard labor, and at the same time is given moral lessons. * * * It had its origin in the Chow Dynasty.

4. Liu, or banishment, has three degrees, namely, (1) two thousand li,⁴³ (2) two thousand and five hundred li, and (3) three thousand li.

5. Sze, or death penalty, has two grades, i. e., (1) strangulation and (2) decapitation.

3. *The Ten Offenses of Marked Flagrance:*

1. The attempt to overturn the government.
2. The attempt to destroy the imperial temples, tombs, or palaces.
3. Adhering to national enemies.
4. Parricide.
5. Brutish cruelty; e. g., murder of three or more persons in one family, or murder by mutilation.
6. Sacrilege.
7. Impiety toward parents; e. g., abusing one's parents with indecent words, or ill-treating them.
8. Family discords.
9. Gross unfaithfulness; e. g., murdering one's superior to whom he owes loyalty, as in the case of master and servant, teacher and pupil, guardian and ward, and husband and wife.
10. Incest.

Annotations—Among other crimes these ten crimes are especially odious, because they set at naught the grand principles upon which our government stands. * * *

⁴³A li is about one-third of a mile.

4. *The Eight Classes of Persons Given Special Consideration when Convicted of or Involved in a Crime.*⁴⁴

1. Relations of the emperor through blood or marriage.
2. Persons who have been in public service for a considerable time and have enjoyed the emperor's confidence.
3. Persons who are virtuous.
4. Persons who have unusual abilities.
5. Persons who have achieved illustrious merits in the national cause.⁴⁵
6. Persons of high rank.
7. Persons who have shown their zeal and assiduity in public service.
8. Persons descended from an alien ancestor who was honored by the founder of a dynasty as a guest.⁴⁶

5. *Laws with Regard to Crimes Committed by the Above Mentioned Eight Classes.*

If a person belonging to any of the eight classes shall be convicted of a crime punishable by death, the judge shall make a report to the emperor, setting forth the grounds of conviction and all necessary facts which entitle him to special consideration, and call a meeting of the regular committee to pass upon the matter and inform the emperor of its decision. In cases where crime is punishable by banishment, imprisonment, or flogging, the prisoner shall suffer a punishment by one degree less severe than an ordinary person under like circumstances.

Provided that this statute shall not apply to the ten crimes of marked flagrancy.

⁴⁴ The law of mutual responsibility of family members, which had been abrogated by Emperor Wen of Han, was revived under T'ang for political purposes, and it was not till the establishment of the present republic that mutual responsibility breathed its last breath.

⁴⁵ A great deal can be said for this and the two preceding items. It is worth our while to quote from Landor, "A wise and dispassionate legislator, if any such should ever arise among men, will not condemn to death him who has done or is likely to do more service than injury to society."

⁴⁶ It was a usual practice for the founder of a dynasty to appoint, as a matter of comity, a virtuous man belonging to the imperial family of the superseded dynasty to be a lord over some territory.

6. *Crimes by Men of Advanced Age, Minors, and Invalids.*⁶⁷

All persons above the age of ninety and minors under the age of seven shall be exempt from punishment even when they are found guilty of a crime punishable by death.⁶⁸

If they shall commit a crime under the direction of another, the latter shall be responsible for the act. Any emolument derived from the crime shall be returned to the proper owner under all circumstances.

Annotations—* * * If a person instructs a minor under seven to assault his parents, he is not to be charged with the crime of assaulting one's parents, but is only responsible for an ordinary assault, the child being regarded simply as the instrument of the crime.

If a crime was committed when the criminal had not reached an advanced age as heretofore prescribed, but the matter becomes known after he has reached the age, still he shall be exempt from punishment.

Question—Suppose the criminal reach the prescribed age pending the prosecution, shall he be exempt from punishment?

Answer—Yes: the gist of the rule is that an old man of the prescribed age is not strong enough to bear the punishment, and therefore it does not matter when he reached the age, if it is certain that he has reached that age.

If the prisoner should reach a prescribed age during his term of imprisonment, he shall be released.

If the minor committed a crime when under a prescribed age, but the matter becomes known when he is above the age, he shall be dealt with as if he were still under that age.⁶⁹

⁶⁷ It may be said that the law of China is the law of mercy. Mercy is consistent with every form of government, be it patriarchal or republican. Though in a republic there is no father and all are equals, yet we must not forget that mercy is inherent in brotherly love even to a greater extent than in paternal feeling.

⁶⁸ There are other provisions with reference to crimes committed by men over seventy and minors under fifteen, and also by men over eighty and minors under ten. There are similar provisions making allowance for a criminal's physical infirmities.

⁶⁹ It seems that in such cases not the ability to bear punishment, but the criminal intent, is the test; and since a minor under a prescribed age is presumed by law to be incapable of or less dominated by the criminal intent, therefore the fact that he is tried when above that age does not change the original nature of his crime.

7. Voluntary Surrenders to Justice.

If a criminal comes to the court at his own instance and discloses his crime before he is prosecuted or before he anticipates a prosecution, he shall be pardoned, provided always that if he has derived any gain from his wrongful act, he shall repay it to the court or to the owner according as the law may direct¹⁰

Annotations—To persist in a wrong is a crime, indeed. Now since an offender takes the initiative in confessing his guilt with a view to expiating it and beginning a new life, therefore he ought to be pardoned. But if his crime has already become known to any third person, though not as yet brought to the notice of the court, when he makes the confession, he is not to be pardoned.

If, during the trial of a lighter offense, the prisoner discloses at his own initiative a graver offense, he shall be pardoned for the latter offense. This will also be true if, in his answers to the questions asked by the judge concerning the offense on trial, he brings forth matters which would constitute another offense.¹¹ If his disclosure is inaccurate or fails to cover the whole ground of his offense, he shall be punished for so much crime as he has not disclosed; provided always that if the residue of the crime would subject him to the death penalty, he shall be punished by one degree less seriously.

Annotations—For example, if a criminal, who by highway robbery took a certain amount of money, discloses to the court that he *stole* so much money, here we have a case of inaccurate disclosure. Since he does not mis-state the amount of money, but simply misrepresents robbery to be theft, therefore he is to be charged with the attempt to rob. The failure to cover the whole ground of a crime may be illustrated by the case where a criminal receives a bribe up to the value of fifteen pihs¹² of cloth, but he confesses only fourteen pihs. Here one pih is not covered by the disclosure; so he is to be punished for receiving a bribe up to the value of one pih. But suppose a robber who robbed up to the value of twenty pihs should confess only ten pihs. According to law, robbing up to the value of ten pihs (which is not covered by the

¹⁰ He is pardoned, but he cannot derive any gain from his wrong-doing. Compare the Roman maxim, "*Nen facias malum ut inde veniat bonum.*"

¹¹ Compare Amendment V. of the United States Constitution, and WILMORE, EVIDENCE, Sections 2252 and 2281.

¹² A pih equals sixteen yards approximately.

confession) is punishable by death; but as the crime is discovered by reason of his confessing the other ten pihs, his punishment shall be one degree lower than death.

Question—In case a person who murdered a stranger confesses to the court that he murdered his maternal uncle (which is not true).

* * * What will be the judgment?

Answer—The murder of a stranger is a lesser crime than the murder of one's maternal uncle. Since he confesses a graver crime than he actually committed, he should be pardoned.

Question—A certain man unlawfully conceals armor and bowstrings, and comes to the court confessing that he conceals a spear (which is a lesser crime). What will be the judgment?

Answer—Since he does not confess the concealment of armor and bowstrings, the whole offense remains; and the fact that he has confessed the spear only excuses the concealment of the spear.

8. *Principal and Accessory.*

Among those who participate in a crime, the original contriver shall be held to be the principal, and the accessories shall suffer a punishment by one degree less severe than the principal.

In case members of a family participate in a crime, the family head alone shall be punished;⁷³ but if the latter is by law exempt from punishment (on account of advanced age or physical infirmity), then the punishment shall fall upon the one who stands next in family rank. Provided that in case of personal injuries the ordinary law of principal and accessory shall govern.

9. *Persons Convicted of Several Crimes.*

Those convicted of two or more crimes shall be punished for the graver crime alone. If the several crimes are of the same degree, the criminal shall receive only one punishment.⁷⁴ If after he is

⁷³ This rule had its origin in *patria potestas*. The family head was of course liable for his own wrong, but, besides, he was also responsible for the offenses of his inferiors, upon the ground that he did not prohibit what he ought and was able to prohibit. In other words, his responsibility was commensurate with his power, and since his power was plenary, so should be his responsibility.

⁷⁴ It is worthy of note that this provision recognizes a merger in crimes of the same degree. This suffices to show that under T'ang the predominant element in penal laws had become exclusively the reformation of the criminal, except in cases of political offenses.

convicted of one crime he is found guilty of another lighter crime, he shall not suffer cumulative punishment; but if the crime which is later discovered is a graver one than that for which he has already been convicted, then he shall suffer punishment for the graver crime.

Provided always that in cases where the criminal has derived benefits from his several crimes, he shall return them all and pay fines for the total amount of the unlawful gains.

10. *Crimes Committed by Barbarians.*

In case a barbarian commits a crime against another barbarian of the same tribe, he shall be dealt with according to the customary law which prevails in the said tribe; but in case he commits a crime against one who belongs to another tribe, he shall be dealt with according to the laws of the empire.⁷⁵

11. *Rule of Interpretation where Statutes Appear Contradictory.*

When a particular provision conflicts with general provisions, the particular provision shall govern.

12. *Interpretation by Analogy.*⁷⁶

In cases where no specific law for the offense is provided, in order to acquit a prisoner the magistrate shall cite statutes which excuse a person for a graver act than that with which the criminal on trial is charged.

Annotations—* * * For example, the law is that if a person enters another man's house in the night without cause, the owner of the house shall not be held responsible for killing him on sight. *A fortiori*, he is not responsible for wounding the trespasser.

On the other hand, to convict and punish a prisoner, the magistrate shall cite statutes which make a less serious act a crime than that for which he is found guilty.

Annotations—* * * For example, according to law, the attempt to murder one's elder relation in the first degree is punishable by death.

⁷⁵ This corresponds somewhat to the distinction of *ius civile* and *ius gentium* in the Roman law.

⁷⁶ "Interpretation by analogy" is perhaps not a very accurate translation; for this is not so much interpretation by analogy as by strict logic, the provision being based upon the premise that the greater contains the less. Compare the Roman maxim, "*Major continet in se minus.*"

A fortiori, in case of actual killing or wounding in an attempt to murder, the same penalty shall be imposed, though the latter is not specifically provided for." * * *

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(TO BE CONTINUED)

"These readings on the general provisions of Chinese law will be followed by similar readings on Chinese family and property law.